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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 127.

IN THE MATTER OF THE PETITION OF THE EVANSVILLE & BOWLING GREEN PACKET COMPANY, as owner of a wharfboat, for limitation of liability,

Petitioner, Appellant,

vs.

CHERO COLA BOTTLING COMPANY, NATIONAL PRODUCE COMPANY, RAPHAEL BROTHERS DRY GOODS COMPANY, *et al.*,

Claimants, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

REPLY BRIEF FOR APPELLANT.

CHAUNCEY I. CLARK,
PHELPS F. DARBY,
Counsel for Petitioner, Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR APPELLANT.

The statement (Appellees' brief, page 6) "Docks and wharves securely fastened to the shore, *even though floating on the water* are not within the admiralty jurisdiction" is not substantiated by the case cited, *Cleveland Terminal & Valley R. R. Co. vs. Cleveland S. S. Co.*, 208 U. S. 316.

We find absolutely no justification for the words "*even though floating on the water.*" In the Cleveland case the damage was to "shore dock, and to bridge, protection piling and pier" (p. 320). There was nothing "floating on the water."

Although appellees concede that "the sole question involved in this case is whether or not the *wharfboat* was a *vessel* within the jurisdiction of a court of admiralty and within the provisions of the Limited Liability Act," (Brief p. 9) their brief continually refers to the boat as a "wharf" not "wharfboat." The word "wharf" as used in appellees' brief might be confused with a wharf alongside the wharfboat, but there was no wharf alongside the wharfboat. Appellees, apparently being concerned about the use of the word "boat", have adopted this expedient, *i. e.*, referring to the boat as a wharf, to avoid embarrassment by use of the proper appellation. In the interrogatories propounded by the same counsel the wharfboat is repeatedly referred to as "wharfboat" and "boat" (Record pp. 129-131).

Indeed, the record shows that during the trial the wharfboat was referred to by Court, counsel or witnesses on 493 occasions (By our count).

289 times it was called a wharfboat;
169 times a boat;
10 times a barge;
20 times a wharf;
5 times either craft, hull or vessel.

Appellees' brief reads:

> "The appellees paid storage charges at monthly rates for the privilege of storing their goods on the *wharf* * * *. (p. 7)

However, in the testimony with reference to the payment for use of the wharfboat, which is quoted in part at pages 22-25 of appellees' brief, the wharfboat is referred to as a "wharfboat" eleven times, once as a "boat."

Counsel nevertheless conclude:

> "The rights, duties and responsibilities of the parties were based upon land contracts and not maritime contracts," (Brief p 7)

Reference is then made to cases involving wharf rent and damage to cargo on wharves, not on wharfboats.

At page 9, appellees' counsel begin the discussion of the facts and say:

> "It appears from the record in this case that this structure consisted of, etc., etc."

They then refer to the wharfboat as a "wooden enclosure," and in the same paragraph and succeeding paragraphs many times as a "wharf." Having ten times referred to the boat as a wharf and making the additional statement that the boat was "stationed permanently" (p. 10), which is contrary to the record, counsel then cite *Cleveland Terminal vs. Cleveland S. S. Co.*, 208 U. S. 316, (p. 11), where a libel for damages to a wharf was dismissed for want of jurisdiction. On the following page (12) they cite another case, *The Plymouth*, where this Court dismissed a libel by the owner of a wharf which was burned by fire.

Counsel for appellees then conclude (p. 12), referring to *Cleveland Terminal vs. Cleveland S. S. Co.* and *The Plymouth*:

> "In the foregoing decisions, it will be seen that the action of the courts in holding that there was no jurisdiction of the case in admiralty courts was based largely upon the grounds that the structures in question, *even though they floated on the waters* or extended over the water, were a continuation of land, and * * * were not structures that were considered vessels * * * ."

The decisions cited do not substantiate the words "*even though they floated on the waters.*" Both the *Cleveland Terminal* and the *Plymouth* cases involved damages to wharves that did not and could not have "*floated*" unless carried away by a flood.

Counsel for appellees assert that:

> "Floating structures, which, although capable of being moved, are from their very nature, build, design and use intended to be *comparatively* permanent, are held not to be vessels within the jurisdiction of admiralty." (Brief, p. 6.)

The cases cited do not substantiate the use of the word "comparatively" before the word "permanent." In *Cope vs. Vallette Dry Dock Co.* the Court was concerned with a dry dock which was actually permanent. To quote from the opinion of this Court, first referring to the facts as found by the Circuit Court:

> "They state that it (dry dock) consisted of a large oblong box, with a flat bottom and perpendicular sides; that in the year 1866 it had been put in position by being *permanently* moored by means of large chains to the right, * * *" (p. 627).
>
> "It was not designed for navigation, and could not be practically used therefor" (p. 627).
>
> "We think no case can be found which would

> construe the terms to include a dry dock, a floating bridge, or meeting house, *permanently* moored or attached to a wharf'' (p. 630) (italics ours).

In *Woodruff vs. One Covered Scow* (E. D. N. Y.) a stationary float was involved. Although the title of the case would indicate that the structure proceeded against was a scow, it was really a ''float,'' ''made of timbers, in width some 11 feet, and in length some 23 feet.'' It was used to store oars and sails of small boats and to afford persons a means of egress from boats coming to the slip of the adjoining wharf and thence to the shore.

Salvage Wrecking Co. vs. Section Dock Co. is another dry dock case, and the remarks under the Cope case are equally applicable to this case. The same is true of *Snyder vs. Floating Dry Dock* (D. C. N. J.). *The Big Jim* (E. D. Pennsylvania) was a pump resting on piles, which had no characteristics of a vessel. *The Steamer Hendrick Hudson* was a saloon and hotel firmly resting on the bottom and ''destined to continue so'' (p. 479). *The Robert W. Parsons* involved a lien for repairs on a canal boat. *Berton vs. Tietjen & Lang Dry Dock Co.* is another dry dock case.

The words ''comparatively permanent'' apparently were found in *Ruddiman vs. A Scow Platform*, 38 Fed. 158 (S. D. N. Y.), a suit for wharfage against a scow platform lying alongside a dock wall at 138th Street, Harlem River, New York. The platform

> ''was designed to be moored alongside a wharf, so that horses with carts could be driven over it from a wharf, with dirt or other refuse to be dumped into boats lying alongside. This was its only use and design. The structure was mainly stationary, and rarely moved.''

The Court used this expression:

> "This structure, though, as I have said, capable of being moved, was designed to be *comparatively* permanent."

The Court held that the structure belonged to the class of cases such as dry docks, floating saloons, bathhouses, floating boathouses and bridges, all of which had been held not to be vessels within the maritime law, and referred to *Cope vs. Vallette Dry Dock Co.* and other cases.

Respectfully submitted,

CHAUNCEY I. CLARK,
PHELPS F. DARBY,
Counsel for Petitioner, Appellant.

New York, January 11, 1926.

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Supreme Court of the United States

In the Matter of the Petition of the EVANSVILLE & BOWLING GREEN PACKET COMPANY, as owner of a wharfboat, for limitation of liability,
Petitioner, Appellant,
vs.
CHERO COLA BOTTLING COMPANY, NATIONAL PRODUCE COMPANY, RAPHAEL BROS. DRY GOODS COMPANY, *et al.*,
Claimants, Appellees.

October Term 1925
No. 127

Appeal from the District Court of the United States for the District of Indiana.

BRIEF FOR THE CHERO COLA BOTTLING COMPANY, NATIONAL PRODUCE COMPANY, RAPHAEL BROTHERS DRY GOODS COMPANY, *et al.*, *Claimants, Appellees.*

STATEMENT OF THE CASE

The appellant in its brief has set out some of the facts but a further statement would more clearly present the question that is before this court for determination.

The appellant is a corporation organized under the laws of the State of Indiana, with its principal office in the City of Evansville, Indiana. It was engaged in the business of operating a line of steamboats from Evansville to various points on Green River in Kentucky.

It also owned a structure designated a wharfboat, which was located at the bank of the Ohio River at the City of Evansville. (Record, pp. 2-35). It was used as a warehouse for the purpose of storing merchandise unloaded from the steamboats, also for storing merchandise intended for shipment on outgoing boats. (Record, p. 37).

The wharfboat is described as a square box two hundred forty-three (243) feet long, forty-eight (48) feet wide, and six (6) feet deep, built of wood and lined on the inside with concrete around the entire structure. The concrete extended from the bottom of the boat to a height along the sides of eighteen (18) to twenty (20) inches and was eight (8) inches in thickness.

The concrete was placed in the wharfboat in the summer of 1921 to strengthen it and stop seepage (Record pp. 37, 67, 131, 132).

The structure floated upon the water and was fastened to the shore by means of four and sometimes five cables. (Record p. 75). Floats and a stage or apron also connected the boat with the shore. These were located at each of the two doors providing drive-

ways from the bank to the wharf. One was near the upper end and one near the lower end. (Record, p. 59 and Exhibits, p. 38 to 39).

At one end of the superstructure was located an office and quarters for the men in charge. It was lighted by electric wiring connected with the City plant. It had plumbing and procured its water supply from the City. It was also connected with the City by telephone. (Record, pp. 47, 58).

No freight was collected but a wharfage charge was made to cover storage when goods were left on the wharf, and for receiving and handling such goods and for clerical work. (Record, pp. 41, 74, 80, 81). The Evansville shippers had the privilege of paying a fixed monthly rental for the use of the wharf ranging from Two and 50-100 Dollars ($2.50) per month to Fifteen Dollars ($15.00) per month. (Record, pp. 81, 121, 123). No freight was charged or earned by the wharf. It made no voyages. It was located continuously at the same point where it was attached to the shore except that it moved up and down the bank to conform to the stage of the river. From the time the appellant company purchased the wharf in 1915 until it sank, May 14, 1922, it remained at the same point attached to the shore, except when it was towed to Green River Harbor to escape the ice, at which times it was not in use. It had no engine, machinery, or power of propulsion; no rudder or steering gear, no smoke stack or pilot house. It transported neither freight nor passengers. It had no means of self propulsion.

The wharf was not subject to inspection by Government inspectors as steamboats and other vessels operating on navigable waters are. (Record, pp. 68, 116).

The wharf has no master, pilot, or crew. The duties of the chief officer are to act as general agent and to have charge of the clerical work of receiving the freight. And he hires the clerical assistants and the deck men. (Record, p. 38).

On the morning of May 14th, 1922, the wharf sank, the outer edges lying in about seven (7) feet of water with about six (6) inches of the cargo box under water.

One of the appellees, The Boetticher & Kellogg Co., made a demand upon appellant for the amount of loss sustained by reason of the damage and loss of goods which it had stored on the wharf and brought an action in the Superior Court of Vanderburgh County, Indiana, for the recovery of damages. Afterward the appellant filed its petition in the District Court of the United States for the District of Indiana under the limitation of liability act, and procured a monition and a restraining order against all of the appellees, restraining them from bringing or prosecuting actions in the State Court. (Record, pp. 7, 8, 121).

The appellees entered their special appearance and filed exceptions to the petition upon the grounds that the District Court had no jurisdiction. The exceptions were overruled. (Record, pp. 8-12).

The appellees filed their answers (Record, pp. 12-26).

Upon the trial of the cause on the 6th day of May, 1924, the court dismissed the petition for want of jurisdiction of the subject matter. The decree of the court was as follows:

"This cause comes on to be heard further at this term, and is argued by counsel, and thereupon upon consideration thereof,

It is ordered, adjudged and decreed that the Court has no jurisdiction of the subject-matter of said cause, and that said cause be and the same is therefore now dismissed, and that each party pay its own costs, to all of which the Evansville and Bowling Green Packet Company at the time excepts."

This memorandum of opinion by the court omitting the title was as follows:

"When this case was presented to me upon exceptions to the libel, my first impression was that the wharfboat in question was not a vessel within the maritime law, but as the exceptions simply raised the question as to the wharfboat described in the libel, and as the proof of the actual construction, use, etc. of the wharfboat might throw additional light upon the subject, I resolved the doubt in favor of the petitioner and overruled the exceptions. The case was afterwards put at issue and tried. The evidence is in the record. It was fully argued and has been thoroughly briefed by counsel on both sides.

In my opinion, the structure shown by the proofs and described (fols. 135-140) in the evidence, is not a

vessel within the maritime law; that therefore this court is without jurisdiction of this cause, and it should, for that reason, be dismissed.

It is so ordered, and a decree to that effect may be prepared and submitted to the court."

SUMMARY.

1. The Structure in question designated as the Evansville Wharfboat was a warehouse so constructed that it would float upon the water, but was fastened securely to the shore by means of four or five large cables.

Docks and wharves securely fastened to the shore, even though floating on the water, are not within the admiralty jurisdiction.

Cleveland Terminal & Valley R. R. Co. vs. Cleveland S. S. Co., 208 U. S. 316.

2. Floating structures, which, although capable of being moved, are from their nature, build, design, and use intended to be comparatively permanent, are held not to be vessels within the jurisdiction of admiralty.

Cope vs. Vallette Dry Dock Co., 119 U. S. 625;

Woodruff vs. One Covered Scow, 30 Fed. 269;

Salvage Wrecking Co. vs. Section Dock Co., 21 Fed. Cas. No. 12,273;

Snyder vs. Floating Dry Dock, 22 Fed. 685;

The Big Jim, 61 Fed. 503;

The Steamer Hendrick Hudson, 3 Ben 419, 11 Fed. Cas. No. 6355;

Ruddiman vs. A Scow Platform, 38 Fed. 158;

The Robert W. Parsons, 191 U. S. 17;

Berton vs. Tietjan & Lang Dry Dock Co., 219 Fed. 763.

3. In some cases where the structure in question was moved about from place to place under some power other than its own in the discharge of its service, it was held to be a vessel within the maritime law, but the courts in their decisions have distinguished these from cases where the structure, although floating upon the water, remained fixed and was not moved about from place to place.

Patton-Tully Transportation Co. vs. Turner, 269 Fed. 334;

Eastern S. S. Corporation vs. Great Lakes Dredge & Dock Co., (C. C. A. 1st Cir.), 256 Fed. 497.

4. The Evansville Wharfboat made no voyages and earned no freight. The appellees paid storage charges at monthly rates for the privilege of storing their goods on the wharf while awaiting shipment on steamboats, or after the goods were unloaded from steamboats. The rights, duties and responsibilities of the parties were based upon land contracts and not maritime contracts.

James T. Furber, 129 Fed. 808;

Salmon Falls Mfg. Co. vs. Tangier, 21 Fed. Cas. No. 12265;

Parkersburg & Ohio River Transportation Co. vs. City of Parkersburg, 107 U. S. 691;
Peoples Ferry Co. vs. Beers, 20 Howard 393;
Sheppard vs. Steele, 43 N. Y. 52;
Brookman vs. Hamill, 43 N. Y. 554;
Olmstead vs. McNall, 7 Blackf. 38;
Galbreath vs. Davidson, 25 Ark. 490.

5. In order to give the Federal Courts jurisdiction as Courts of Admiralty, it is necessary that the entire subject matter be maritime. It is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature.

Cox vs. Murray, Fed. Cas. No. 3304;
Berton vs. Tietjan & Lang Dry Dock Co., 219 Fed. 763;
Plummer vs. Webb, Fed. Cas. No. 11,233.

6. While wharves, docks and levees are all aids to navigation, Congress has never undertaken to provide for their regulation or supervision but has left that exclusively to the States.

Parkersburg & Ohio River Transp. Co. vs. City of Parkersburg, 107 U. S. 691.

7. The Statutes of Indiana, Burns Rev. Stat. 1914, Sec. 8655, delegates to the Common Council of Cities the right to control and regulate wharves and the loading and unloading and the landing of boats and watercraft.

8. There is no authority, even under the guise of a liberal construction of the limitation act, to under-

take to extend the Federal jurisdiction to the exclusion of the rights of the parties under the State law.

ARGUMENT.

The sole question involved in this case is whether or not the wharfboat was a vessel within the jurisdiction of a court of admiralty and within the provisions of the limited liability act.

There are numerous decisions in this court and other courts which bear upon this question and we will undertake to show that none of these decisions have gone to the extent of holding that a structure of this kind firmly attached to land and forming a connection between the land and the water is a vessel within the purview of the admiralty law or within the provision of the limitation of liability act.

There are many tests used by the courts in determining this question and among them may be enumerated the following:

1. The manner of the construction and equipment of the structure.
2. The purpose for which it was constructed.
3. The business in which it is engaged.

We shall undertake to discuss this question with these points in mind. It appears from the record in this case that this structure consisted of a rectangular wooden enclosure two hundred forty-three (243) feet long, forty-three (43) feet wide and six (6) feet deep, all of the sides of which were perfectly parallel and perpendicular, and upon which was constructed a car-

go box or ware room, and upon one end of which was a large room fitted up for quarters for the men in charge of the wharf and as a business office; that it contained no machinery or apparatus of any kind for its own propulsion or steering; that it made no voyages, either for the carriage of freight or passengers, or for any other purpose whatever, but that it was during all the time from its purchase by the appellant in 1915 until the time it sank, May 14, 1922, stationed permanently at the bank of the Ohio River in the City of Evansville, Indiana, securely fastened to the shore by four and sometimes five heavy cables, and maintained in its position by spars extending from the shore to the wharf; that it was further attached to the shore by two floating pontoons and stages or aprons, the pontoons being located next to the wharf and the aprons extending from the pontoons to the bank and thus affording a driveway for trucks and other vehicles from the shore to the wharf; one pontoon and apron being located at the doorway near the upper end of the wharf and one at the doorway near the lower end of the wharf, so that trucks and other vehicles might drive on the wharf at one doorway and off at the other after loading and unloading.

It further appears from the evidence that the wharf was also connected with the shore in that the plumbing on the wharf was connected with the water mains of the City of Evansville, for the purpose of furnishing water for the use of the men on the wharf; that it was connected also with the City Electric Light

Plant and procured its light from the City; that it was connected with the telephone system of the City of Evansville and had a telephone installed in the office.

The only occasion upon which the wharf was moved during all the period of time from her purchase by the appellant in 1915 to the time of her sinking, May 14, 1922, was when it was towed to the ice harbor in Green River to escape the danger from ice.

In *Cleveland Terminal & Val. R. R. Co. vs. Cleveland S. S. Co.*, 208 U. S. 316, a libel in rem was brought against the steam propellor, William E. Rines, for damages to the center pier of a railroad bridge spanning the Cuyahoga River, a navigable stream at Cleveland, Ohio, and for damages to a dock or wharf below the bridge. The District Court sustained exceptions and dismissed the libel for want of jurisdiction. Justice Fuller sustained the decree dismissing the libel for want of jurisdiction and in the decision says:

"But the bridge, shore docks, protection piling piers, etc., pertain to the land. They were structures connected with the shore and immediately concerned commerce upon the land. None of these structures were aids to navigation in the maritime sense but extensions of the shore and aids to commerce on land as such."

In this connection, attention is called to the language used by the appellant in its petition herein to describe the Evansville Wharfboat. The words used are as follows:

"which vessel then being used by this petitioner in said port of Evansville in such manner as to form a

communication between the land and the vessels loading or unloading or receiving and landing passengers and freight at said port."

In *The Plymouth*, 3 Wallace 20, a libel was brought by the owner of a wharf which was burned by a fire negligently started in the Steamer Falcon lying next to the wharf of the libellant. The Steamer Plymouth belonging to the same company was libelled.

The petition was dismissed in the District Court and on appeal the decision of the District Court was affirmed and the case dismissed. It was held by the court that the remedy for the injury belonged to the court of common law and that the admiralty court had no jurisdiction.

In the foregoing decisions, it will be seen that the action of the courts in holding that there was no jurisdiction of the case in admiralty courts was based largely upon the grounds that the structures in question, even though they floated on the waters or extended over the water, were a continuation of land, and even though they had been considered in a sense aids to navigation, were not structures that were considered vessels used upon navigable waters for the purpose of transportation.

There is another line of cases in which the decisions are based upon the purpose for which the structure was constructed and the manner in which it is used. The leading case in this class is that of *Cope vs. Vallette Dry Dock Co.*, 119 U. S. 625. It was held that a fixed structure, contrived for the purpose of taking

ships out of the water in order to repair them and for no other purpose, consisting of a large oblong box with a flat bottom and perpendicular sides, with no means of propulsion and not designed for navigation but only as a floating dry dock, is not within the admiralty jurisdiction and is not a subject of salvage service. Mr. Justice Bradley in delivering the opinion of the court, used the following language:

"We have no hesitation in saying that the decree of the Circuit Court was right. A fixed structure such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water. The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage. A ferry bridge is generally a floating structure hinged or chained to a wharf. This might be the subject of salvage as well as a dry dock. A sailor's floating bethel or meeting house moored to a wharf and kept in place by a paling of surrounding piles is in the same category. It can hardly be contended that such a structure is susceptible of salvage service."

And further the court uses the following very significant language in this opinion:

"We think no case can be found which would construe the terms "ship-vessel" to include a dry dock, floating bridge or meeting house permanently moored or attached to a wharf."

The same principle was decreed by Mr. Justice Brown delivering the opinion of the Supreme Court in the case of *Perry vs. Haines—The Robert W. Parson*, 191 U. S. 17. The language of the court is as follows:

"In fact, neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged. The application of this criterion has ruled out the floating dry dock, the floating wharf, the ferry bridge hinged or chained to a wharf, the sailors' bethel moored to a wharf. (*Cope vs. Valette Dry Dock Co.*, 119 U. S. 625) a gas float moored as a beacon, (*The Whitton*) (1895) P. 301; (1896) P. 42; (1897) A. C. 337."

The cases we have just referred to are in harmony with the earlier decisions of the U. S. Supreme Court. In the case of *Snyder vs. A Floating Dry Dock*, 22 Fed. 685, Judge Nixen reviewed a number of earlier decisions and among them the case of *Henrick Hudson*, 3 Ben 419. This was a case in rem against a floating steamboat which had been dismantled and stripped of her boiler, engine, and paddle wheel and fitted up as a saloon and hotel. It was capable of being towed from place to place on the river. While being towed, it sank, and libellants with the use of their propellors pumped her out and brought action for salvage. The defense was that the boat was without motive power and not used in commerce and that the court had no jurisdiction. Justice Bradley dismissed the libel for the rea-

son that the hull was not in any proper sense engaged in commerce. The court said:

"A floating house of religious worship or a floating swimming bath, or a floating residence could be towed and in such a sense navigated, but such a structure would not be engaged in navigation in such a sense as to be liable in rem in the admiralty for a service like the present one. The fact that the structure had the shape of a vessel or had once been used as a vessel or could by proper appliance be again used as such cannot affect the question."

In quite a number of cases the courts have held that a structure was a vessel within the provisions of the admiralty jurisdiction upon the grounds that it was used in aid of navigation, and that in the performance of its service it was moved from place to place upon the water.

In the case of *Patton-Tully Transportation Co. vs. Turner*, 269 Fed. 334, decided by the Circuit Court of Appeals for the 6th Circuit in December, 1920, it was held that a derrick boat used for loading and unloading logs from the river bank upon and from boats, first at one point and then at another, was a "vessel". Attention is called to the fact that the structure under consideration in this case, just as in the other cases where they were held to be "vessels", was one which in the performance of its duties was navigated from place to place. In the court's decision, the following language is used:

"From the cases cited, we assume (without expressly deciding) that a wharf or floating wharf, carrying this type of loading machinery, but firmly moored to land, would be outside the maritime jurisdiction, even though it was contemplated that it might, on occasion, be towed to another location, and we likewise assume that a barge carrying similar machinery, but customarily moved about a harbor and transferring cargo from one vessel to another would be within that jurisdiction."

In this connection, the appellees respectfully direct the attention of the court to the fact that in every instance where a structure has been held to be a "vessel", it was moved about from place to place in the discharge of the service for which it was intended, either under its own power or some other power, and transported from place to place a cargo consisting either of merchandise being transported or of machinery and equipment used for the purpose of transportation and that without exception it has been held by the courts that where a structure is permanently fastened or moored to the shore and is not moved from place to place in the discharge of its duties, such structure is not a "vessel".

In appellant's brief, reference is made to the case of *Eastern S. S. Corporation vs. Great Lakes Dredge & Dock Co.*, (C. C. A. 1st Cir.), 256 Fed. 497. In this case the Circuit Court of Appeals held that a drill boat was a vessel. This drill boat was a navigable structure having a permanent cargo, viz; its engine, boiler,

drilling machinery, etc., which it transported from place to place, for the purpose of removing ledges in navigable waters, and as an aid to commerce and navigation. The court further says:

"It was not a floating dry dock intended to be permanently moored as was the case in *Cope vs. Vallette Dry Dock Co.*, 119 U. S. 625, but was intended and used for the transportation of a cargo which it carried from place to place to remove ledges. We are therefore of the opinion that it is a vessel within the meaning of Sec. 4283-4289, as construed in the cases above cited."

This case was appealed to the Supreme Court but was dismissed by the petitioners.

Circuit Judge Anderson in a dissenting opinion, says in part:

"Undoubtedly the Amendment of 1886 exten the scope of the Limited Liability Act of 1851. But barges and lighters now included are to some extent commercial carriers. They may fairly be called a part of our merchant marine. Congress did not, it seems to me, intend to limit the doctrine of respondeat superior for the benefit of every owner of anything which can be floated, and which might as an incident of its use, occasionally be floated. A dry dock was floated from the United States to the Philippines. The fact that it was floated, and (to use the language of the majority opinion) was an "aid to commerce and navigation" did not make it a vessel within the meaning of the limited liability act. A bell buoy floats and is an aid to navigation. Is it a vessel? Piers and light-

houses are great "aids to navigation". So is every means of improvement of navigable waters, but something more is necessary in order to make the "aid" a "vessel" within the meaning of the limited liability act. It is true that in the *P. Sanford Ross Case* (D. C.), 196 Fed. 921, it was held that a barge on which was mounted a pile driver described as "a permanent cargo" was a vessel within the limited liability act. But this pile driver might have been removed and the barge used for ordinary transportation work. Drill Boat No. 4 was much more like a dry dock than like a barge with the attached pile driver. To hold that this drill boat was a vessel is nearly, if not quite, to change the statutory definition so as to read: The word 'vessel' includes every artificial contrivance capable of being floated. It eliminates the idea that a floater shall be the means of transportation, that is, that it shall perform some carrier function. The determination of this case does not, in my opinion, require us to hold that this drill boat was a vessel. To extend the doctrine of limited liability to everything floated and floatable is in my view to menace and not to promote commerce and navigation."

The decision of the Supreme Court in the case of *Cope vs. Vallette Dry Dock Co., supra*, has been cited and followed as the leading and highest authority upon the questions involved in that case. It has been cited and followed in the comparatively recent case of *Berton vs. Tietjan & Lang Dry Dock Co.*, 219 Fed. 763. This was an action that was originally brought in the State Court of New Jersey to recover under the com-

pensation law for injuries sustained by the plaintiff while repairing a tug which was in defendant's dry dock in the Hudson River at Hoboken. The defendant procured the removal of the case to the Federal Court on the ground that it was of admiralty jurisdiction and filed its petition for limitation of liability under Sec. 4283-4284-4285. The court remanded the case back to the State Court where it was originally brought upon the grounds that the dry dock was not a vessel and that the Federal Court did not have jurisdiction; the parties being both citizens of the same state, and the limitation liability act not applying, the suit should be remanded back to the State Court whence it came.

The case of *Old Natchez* is cited and discussed by the appellants, and in their brief they refer to it as a wharfboat. As a matter of fact it was not a wharfboat and never had been used as such. It was an old steamboat which had been partly dismantled by the removal of a part of her machinery. In the United States Circuit Court on appeal, she was held to be a subject of salvage service, but the Circuit Court in its decision says:

"Whether a boat fitted, arranged, and actually used as a wharfboat can be the recipient of maritime service in saving her from impending peril so as to make her liable for salvage, it is not necessary to decide."

The court in further reviewing the decision of the District Court used the following language:

"Conceding that the actual use of the property may determine the right to salvage as was decided in the Hudson case, yet here the Natchez was not yet used as a wharfboat, but stood upon the same footing as any other barge moored to the bank of the river waiting to be loaded, towed away permanently, tied up, or broken up as the business or interests of the owners might suggest or require."

This decision of the Circuit Court therefore lends no support to the proposition that a wharfboat is included within the term "vessel" as used in the maritime law but rather supports the proposition that a dismantled steamboat is subject to salvage service notwithstanding the fact that some of her machinery and equipment has been removed.

In *Ruddiman vs. A Scow Platform*, 38 Fed. 158, it was held that:

"A floating structure designed to be moored alongside a wharf so that carts containing refuse to be dumped into boats can be driven over it from the wharf is not a vessel within the meaning of the maritime law and no lien for wharfage attached to it under that law."

In the case of *Woodruff vs. One Covered Scow*, 30 Fed. 269 it was held that:

A float supporting a floor and a house, used to store oars and sails of small boats landing at it and as a means of egress from it to the wharf at which it was moored and thence to the shore, being stationary and

never employed in transportation upon the water, cannot be held to be a ship or vessel.

"This structure, though, as I have said, capable of being moved, was designed to be comparatively permanent. By its nature, build, design, and use, it belonged to that considerable class of cases, such as dry docks, floating saloons, bath houses, floating bethels, floating boat houses and floating bridges, all of which have been held not to be vessels within the maritime law."

Ruddiman vs. A Scow Platform, supra.

These decisions also are cited in support of the proposition that the structure, whatever the nature of it is, which is securely fastened to the shore cannot be considered a "vessel" under the maritime law.

Section 3 of the United States Revised Statutes is as follows:

"The word 'vessel' includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water."

The foregoing statute uses the word "transportation", solely and exclusively in the limited sense of transporting or carrying freight or passengers from one place to another.

"Transportation implies the taking up of persons or property at some point, and putting them down at another."

Gloucester Ferry Co. vs. Penn., 114 U. S. 196, 29 L. Ed. 158, 5 SCT 826, 828.

THE EVANSVILLE WHARFBOAT WAS NOT A VESSEL IN THE LIMITATION OF LIABILITY ACT FOR THE FURTHER REASON THAT SHE DID NOT TRANSPORT NOR CARRY FREIGHT BUT WAS MERELY A FLOATING WAREHOUSE.

This is another distinction that clearly eliminates the subject matter of this action from admiralty jurisdiction. The claims of the appellees against the appellant arises out of contracts for storage and not freight. It appears from the record that some of the shippers paid a fixed monthly storage or warehouse charge instead of paying on the basis of the amount of merchandise passing over the wharf.

The examination of Oscar Boetticher, an officer of the appellee, Boetticher Kellogg Company, is found at P. 121 of the record and is as follows:

Q. You are an officer of the Boetticher Kellogg Company?

A. One of the Vice-Presidents.

Q. And had charge of the shipment of this freight on the Evansville Wharfboat?

A. No, I didn't have charge of that. We have a shipping Clerk.

Q. But your company did have some goods on the boat when it sank?

A. Yes sir.

Q. For which you filed your claim before the Master?

A. Yes sir, about eighteen hundred dollars worth.

Q. Have you ever gotten any of it?

A. We never have gotten a cent.

Q. State whether or not you made a demand and afterward followed that by a suit in the Superior Court of Vanderburgh County.

A. Yes sir.

Q. And were prevented from going any further by the order of this court?

A. Yes sir.

Q. What arrangement did you have with the Evansville Wharfboat Company about the storage charge on the wharfboat?

A. We paid them $15.00 a month to haul the freight on the wharfboat and get a receipt for it, usually on the day that the boat is supposed to sail or leave the wharfboat.

Q. And at the time she sank in May, 1922, you were at that time paying $15.00 a month storage charge for use of the wharfboat?

A. I think that was the amount at that time. I know it is $15.00 now.

Examination of F. A. Dickman, a witness on behalf of the appellee, Globe-Bosse-World Furniture Co. Questions by Mr. Kahn. Record, p. 123.

Q. You are the Credit Manager for the Globe-Bosse-World Furniture Co.?

A. Yes, manager and cashier.

Q. Was that company one who had merchandise aboard at the time of the sinking of this wharfboat?

A. Yes sir.

Q. Did that company have an arrangement with the Evansville and Bowling Green Packet Company, with reference to the use of the wharfboat at Evansville, at that time?

A. Yes sir.

Q. Will you please state what it was?

A. The arrangement at that time was $2.50 per month flat rate for the privilege of loading freight on the wharf. They received it on the wharf and then reloaded it on to the boats as they came in.

The wharfage charge was separate and distinct from any freight charge. It was an amount paid for storage of the merchandise either while waiting shipment on a steamboat or after it had been landed from the boat in the case of incoming freight.

A part of the cross examination of Jeff H. Williams, General Agent of the appellant and manager of the wharfboat as the same appears at pp. 80 and 81 of the record. Questions by Mr. Kahn.

Q. Now the wharfboat received a separate wharfage charge, did it, for handling each item of freight?

A. Well, we received a wharfage charge from all shipments regardless of where they originated or their destination. It is in our tariff that the wharfage charge of two and a half cents a hundred, a fifteen cent minimum, and a drayage charge of twenty-five cents a hundred, that is part of the through freight charge.

Q. And that is in addition to the charge that boats operated by your corporation or any other corporation may charge or receive for carriage?

A. That is in addition to freight, yes.

Q. That goes to the wharfboat?

A. Yes sir.

Q. And some of that charge is a flat monthly charge, is it not?

A. Well, they have the liberty of paying the—the local people do.

Q. At that time in May, 1922, when the wharfboat sank and some time prior to that time, wasn't there an arrangement between your company and local shippers in Evansville whereby they would have the use of the wharfboat as such, at a monthly rate?

A. Yes sir, it was their privilege to pay that.

Q. And that was in addition to the carriage charge?

A. Yes sir, they had the privilege of paying that.

It has been repeatedly held by the courts that actions growing out of the relations between the shipper and the wharfinger pertain to the land and are not of a maritime nature. In the case of *James T. Furber*, 129 Fed. 808, the court held that a lease of space at a wharf for use at a fixed rental is a lease of real estate and not a maritime contract on which a suit in admiralty can be maintained for the collection of rent since it has not necessarily any connection with navigation or the commerce of the seas.

Empire Warehouse Co. Lim. vs. The Advance, 71 Fed. 987.

To the same effect is the case of *Salmon Falls Mfg. Co. vs. Tangier*, 21 Fed. Cas. 12265, in which it was

held that the limitation of liability act does not apply to a loss of goods by fire after they are landed on the wharf.

The fact that the appellant operated a steamboat in addition to operating a wharfboat does not change the rule fixing its liability as a wharfinger. The appellant owns and operates the Evansville Wharfboat as a public wharf for the use, not only of its own steamboats but steamboats belonging to others. After goods had been transferred from the wharfboat to the steamboats for transportation, then the limited liability act no doubt applies. Before that, the appellant is liable in its other capacity as a wharfinger, and there is a distinct line of demarcation between its liability as a wharfinger and its liability as a carrier of goods on its steamboats.

A wharfinger has been defined as one who maintains for hire a wharf for receiving goods.

Rodger vs. Stophel, 32 Pa. St. 111;
Old Dominion S. S. Co. vs. City of New York, 286 Fed. 155;
M. & J. Tracey vs. Marks Lissberger & Sons, 283 Fed. 100.

The case of *Parkersburg and Ohio River Transportation Company vs. City of Parkersburg*, 107 U. S. 691, is in point upon the question under discussion. This was an action by the transportation company against the City of Parkersburg to restrain the collection of wharf duties upon the grounds that the collection of wharfage was illegal because it was in conflict

with the Constitutional provision relating to the regulation of commerce and prohibiting any state from laying a duty on tonnage. The Supreme Court in its decision dismissing the bill for want of jurisdiction said:

"Now wharves, levees and landing places are essential to commerce by water no less than a navigable channel and a clear river but they are attached to the land. They are private property, real estate and they are primarily, at least, subject to the local state laws. Congress has never yet interposed to supervise their administration. It has hitherto left this exclusively to the States."

Congress has seen fit to regulate steamboats, gasoline boats, flat boats, barges, lighters, and all manner of craft actually navigating the rivers and lakes. It provides for inspecting and equipping steamboats, barges, canal boats, and lighters. It regulates the manner in which they shall be operated, provides for certain signals to be used by one boat on meeting or passing another boat, for the display of colored lights at night, for the examining and licensing of pilots, for the registration of such boats and vessels, but Congress has left to the States and municipalities the matter of regulating the subject of wharves.

Sec. 8655 Burns' Rev. Stat. of 1914, Clause 29, defining the powers of the Common Council of the cities, provides as follows:

"To establish and maintain a wharf or wharves, control and regulate the same, to fix the rates of wharfage and enforce the collection of the same, to

regulate the landing of boats and watercraft and the loading or unloading thereof, etc."

The appellees insist that the question of the liability of the appellant is governed by the laws of the State of Indiana. All of the parties are residents of Indiana. The contracts for the storage of goods on the wharf were made in Indiana. One of the appellees, Boetticher Kellogg Co., after making demand on the appellant for the loss sustained, brought an action against the appellant in the State Court to recover its damages, and it was after this that the appellant filed its petition in the Federal Court, and procured a restraining order against the prosecution of that action. Courts of admiralty cannot and do not exercise jurisdiction in any form whatever in actions growing out of land contracts.

Peoples Ferry Co. vs. Beers, 20 Howard 393, 15 L. Ed. 961;

Sheppard vs. Steele, 43 N. Y. 52, 2 Am. Rep. 660.

In the case of *Olmstead vs. McNall*, 7 Blackf. 387, it was held that the term: "boats and other vessels" in a statute giving a lien for repairs, etc., does not include a floating wharf, but the court permitted the foreclosure of a mechanic's lien on a wharfboat.

In *Galbreath vs. Davidson*, 25 Ark. 490, it was held that a wharfboat is not a boat in the sense that it is a vessel, but rather it is a building or floating business house and sustained by cables.

In fact, the courts have gone even farther than this and taken the position that where any part of the subject matter was not of a maritime nature, the admiralty courts would not assume jurisdiction.

Art. 3, Sec. 2, of the Constitution of the United States provides that the judicial power of the United States Courts is extended "to all cases of admiralty and maritime jurisdiction". In the acts of Congress codifying the laws pertaining to the judiciary, approved March 3, 1911, and which took effect January 1, 1912, it is provided that the District Courts "have original jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." It is evident that the purpose of Congress in this enactment was to concede to every one his remedy under the common law or under the provisions of the law of his state and the right to seek redress in the State Court except in all cases where the subject matter was clearly and entirely of a maritime nature.

As was said by the court in the case of *Berton vs. Tietjan & Lang Dry Dock Co.*, 219 Fed. 763,

"It is only where the substance of the whole contract is maritime that a court of admiralty takes jurisdiction."

In the opinion in this case the court referred among other citations to the case of *Richard vs. Hogarth*, (D. C., District New Jersey) 94 Fed. 684. In this case a libel was filed to recover compensation for

effecting a contract of affreightment for the steamship Folbridge. The defendants raised the question of jurisdiction. The libel was dismissed by the District Court for want of jurisdiction, and in the opinion, the court quotes and approves the language of Judge Betts in *Cox vs. Murray*, Fed. Cas. No. 3304 as follows:

"Undertakings which are merely personal in their character, or which are preliminary to maritime contracts, do not seem ever to have been recognized as within the admiralty jurisdiction."

Further on in the decision the court says:

"In order to give the court jurisdiction, the substance of the whole contract must be maritime. It is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature." Citing *Plummer vs. Webb*, Feb. Cas. No. 11,233.

Applying this reasoning to the case at bar, we say that the relationship of the parties is controlled by their agreement for storage upon the wharf of the appellant, and that these contracts were land contracts and did not pertain to maritime subjects simply because the same goods were afterward to be shipped upon steamboats belonging to the appellant or other persons.

The fact that the wharf was to be used for storing goods preliminary to their shipment is evidence that the wharf was merely an *aid to transportation* and not a *means of transportation.*

We respectfully present the argument and reasoning in the cases last above referred to, also upon the proposition that the courts are not disposed to extend the jurisdiction in admiralty or to extend the relief provided in the limitation of liability act to those cases which do not clearly come within the bounds of the jurisdiction as fixed by the Constitution and the rules of admiralty.

The appellees respectfully submit that the Evansville Wharfboat is not a vessel within the maritime jurisdiction or within the provisions of the limitation of liability act, and that the decision of the District Court should be approved and this cause dismissed for want of jurisdiction.

Respectfully submitted,
JAMES T. CUTLER,
JOSEPH H. IGLEHART,
PAUL H. SCHMIDT,
ISIDOR KAHN.

Evansville, Indiana, December, 1925.